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91ST CONGRESS }
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SENATE

{ REPORT
No. 91-968

JOECK KUNCEK

JUNE 25, 1970.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 1698]

The Committee on the Judiciary, to which was referred the bill (H.R. 1698) for the relief of Joeck Kuncck, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to relieve Joeck Kuncck of all liability to the United States in the amount of \$11,462.23, representing overpayments of retired pay made in the period from July 26, 1954, to January 1, 1967, as the result of administrative error. The bill would further authorize a refund of any amounts repaid or withheld by reason of this liability.

STATEMENT

The Department of the Army in its report on the bill stated that in view of the hardship imposed on the retired officer, the Department would not oppose the bill. The Comptroller General in a report on the same bill questioned legislative relief but stated that relief in this instance involves a matter of policy for the Congress to decide.

Mr. Joeck Kuncck enlisted on July 16, 1924, and served continuously until honorably discharged on October 27, 1942, in the grade of master sergeant to accept a commission as a second lieutenant, Army of the United States. On April 11, 1944, he was promoted to the grade of first lieutenant. On March 7, 1947, he was released from active duty as an officer and on March 10, 1947, he reenlisted in the Regular Army.

On May 31, 1947, he was placed on the retired list and transferred to the Enlisted Reserve Corps, under Public Law 190, 79th Congress (now codified as 10 U.S.C. 3914), with credit for 22 years, 10 months, and 5 days active Federal service for basic pay purposes. In July 25, 1954, he was discharged from the Army Reserve, with 30 years of active and inactive service, and advanced to the grade of first lieutenant on the retired list under section 203(e), Public Law 810, 80th Congress, as amended (now codified as 10 U.S.C. 3964). Upon his advancement on the retired list he was entitled to retired pay based upon the basic pay for the grade to which advanced and his 23 years of active Federal service (a fraction more than one-half counts as a year). In recomputing his retired pay, Kuncsek was erroneously credited with 30 years active Federal service and paid 75 percent (30 times $2\frac{1}{2}$ percent) of the basic pay for a first lieutenant instead of the authorized $57\frac{1}{2}$ percent (23 times $2\frac{1}{2}$ percent). As a result of this error, Kuncsek was overpaid retired pay in the total amount of \$11,462.23.

The facts outlined above and detailed in the departmental report demonstrate that the overpayment in this instance occurred as the result of an administrative error on the part of Government personnel in computing retired pay. The confusion occurred when combined active and inactive service were taken as a basis for the computation rather than the 23 years of active Federal service which should have been the basis for the computation. As has been noted this error was continued over the extended period of more than 12 years. The Department of the Army in its report states that its investigation had disclosed that these overpayments resulted solely from administrative error by the Department of the Army personnel. The Army further found that there was no indication that Mr. Kuncsek was not justified in relying on the retired pay computation made by Army personnel. Similarly, the Army found that there was nothing to indicate a lack of good faith in receiving the monthly checks. The committee has further concluded that the fact that Mr. Kuncsek is now approaching 66 years of age and other factors outlined in the Army report demonstrate that repayment is a clear hardship on the retired officer. In 1967 the Army stated that Mr. Kuncsek's wife had suffered a heart attack 2 years previously and Mr. Kuncsek had to negotiate a substantial personal loan to pay hospital and doctors' fees. The Army found that Mr. Kuncsek had no property except a car given him by his children and that he has no source of income other than his retirement pay. In view of these circumstances the Army did not oppose the bill.

This bill is similar to many that the committee has favorably considered in the past few years. The overpayments to the serviceman were made through administrative error. The claimant received the overpayments in good faith and repaying the amount paid would impose undue financial hardship on the claimant. In view of these facts, the committee is of the opinion that the bill is meritorious and recommends it favorably.

Attached hereto and made a part hereof are the reports on a similar bill from the Department of the Army and the Comptroller General to the House Judiciary Committee.

DEPARTMENT OF THE ARMY,
Washington, D.C., November 6, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army on H.R. 8479, 90th Congress, a bill for the relief of Joeck Kunceck.

This bill would relieve Mr. Kunceck from liability to repay the United States \$11,462.23, representing overpayments of retirement pay between July 26, 1954, and January 31, 1967, and would authorize the repayment of any amount already withheld from him in satisfaction of this debt.

The Department of the Army is not opposed to the bill.

Official records of the Department of the Army show that Mr. Kunceck enlisted on July 16, 1924, and served continuously until honorably discharged on October 27, 1942, in the grade of master sergeant to accept a commission as a second lieutenant, Army of the United States. On April 11, 1944, he was promoted to the grade of first lieutenant. On March 7, 1947, he was released from active duty as an officer and on March 10, 1947, he reenlisted in the Regular Army. On May 31, 1947 he was placed on the retired list and transferred to the Enlisted Reserve Corps, under Public Law 190, 79th Congress (now codified as 10 U.S.C. 3914), with credit for 22 years 10 months, and 5 days active Federal service for basic pay purposes. On July 25, 1954, he was discharged from the Army Reserve, with 30 years of active and inactive service, and advanced to the grade of first lieutenant on the retired list under section 203 (e), Public Law 810, 80th Congress, as amended (now codified as 10 U.S.C. 3964). Upon his advancement on the retired list he was entitled to retired pay based upon the basic pay for the grade to which advanced and his 23 years of active Federal service (a fraction more than one-half counts as a year). In recomputing his retired pay, Kunceck was erroneously credited with 30 years active Federal service and paid 75 percent (30 times 2½ percent) of the basic pay for a first lieutenant instead of the authorized 57½ percent (23 times 2½ percent). As a result of this error, Kunceck was overpaid retired pay in the total amount of \$11,462.23.

Collection action began on May 1, 1967, by withholding \$30 a month from Mr. Kunceck's retired pay of \$286.43. Collection action was suspended on June 1, 1967, after a single repayment, under authority of the Comptroller General of the United States (M.S. Comp. Gen. 161309, June 13, 1967), until the close of the first session of the 90th Congress.

The overpayments of retired pay to Mr. Kunceck resulted solely from administrative error by Department of the Army personnel. There is no evidence that Mr. Kunceck was not justified in relying on the retired pay computation made by Army personnel, or was lacking in good faith in receiving the monthly checks. Mr. Kunceck is approaching his 64th birthday. His wife had a heart attack 2 years ago and he had to negotiate a substantial personal loan to pay sizable hospital and doctors' fees. He owns no property except a car given him by his children and has no source of income other than his retired pay. As

the hardship that would result from repayment of this liability is manifest, and as the debt was incurred in good faith through no fault of Mr. Kunccek, the Department of the Army does not oppose the bill.

The cost of the bill, if enacted, would be \$11,462.23.

The Bureau of the Budget advises that from the standpoint of the administration's program there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

STANLEY R. RESOR,
Secretary of the Army.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, May 18, 1967.

B-161309.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives.*

DEAR MR. CHAIRMAN: Reference is made to your letter of April 18, 1967, requesting our views on H.R. 8479, 90th Congress, introduced for the relief of Joeck Kunccek.

The bill provides in section 1 "That Joeck Kunccek (First Lieutenant, United States Army, retired, serial numbered O497752) of Muskogee, Oklahoma, is relieved of liability to the United States in the amount of \$11,462.23, representing the total amount of overpayments of retired pay received by the said Joeck Kunccek during the period beginning July 26, 1954, and ending January 31, 1967, as a result of administrative error."

Section 1 also provide that in the audit and settlement of the accounts of any certifying or disbursing officer of the United States "credit shall be given for amounts for which liability is relieved by this section."

Under section 2(a) of the bill, the Secretary of the Treasury is authorized and directed to pay "out of any money in the Treasury not otherwise appropriated, to the said Joeck Kunccek an amount equal to the aggregate of the amounts paid by him, or withheld from sums otherwise due him, with respect to the indebtedness to the United States specified in the first section of this Act."

The record discloses that Mr. Kunccek was retired May 31, 1947, under authority of section 4, act of October 6, 1945, ch. 393, 59 Stat. 539, as amended (now 10 U.S.C. 3914), as a master sergeant with 22 years, 10 months and 5 days of active service. He was entitled to receive retired pay computed at the rate of 57½ percent (22 years, 10 months and 5 days counted as 23 years times 2½ percent) of the active duty pay of a master sergeant with over 22 years of service creditable for basic pay.

On July 25, 1954, he completed a total of 30 years of service (the sum of his active service and his service on the retired list) and effective July 26, 1954, he was advanced on the retired list to the grade of first lieutenant (the highest temporary rank satisfactorily held while serving on active duty) pursuant to section 203(e), act of June 29, 1948, ch. 708, 62 Stat. 1086, which authorized "retirement pay

at the rate prescribed by law for his length of service at the time of retirement but based upon such higher temporary rank or grade."

In accordance with the provisions of the 1948 act, Mr. Kunczek became entitled effective July 26, 1954, to receive retirement pay computed at 57½ percent of the active duty pay of a first lieutenant with over 22 years of service creditable for basic pay. However, when his retired pay was recomputed on the basis of his highest temporary rank as first lieutenant, it was computed at 75 percent rather than 57½ percent of the active duty pay of a first lieutenant with his years of creditable service for basic pay. The erroneous computation covered the period July 26, 1954, to January 31, 1967, inclusive, resulting in overpayment of retired pay to him as follows:

Period	Rate due	Rate paid	Rate overpaid	Total
July 26, 1954-Mar. 31, 1955	\$208.78	\$272.33	\$63.55	\$518.99
Apr. 1, 1955-May 31, 1958	237.71	310.05	72.35	2,748.92
June 1, 1958-Sept. 30, 1963	251.97	328.65	76.68	4,907.52
Oct. 1, 1963-Aug. 31, 1965	264.57	345.08	80.51	1,851.73
Sept. 1, 1965-Nov. 30, 1966	276.21	360.26	84.05	1,260.75
Dec. 1, 1966-Jan. 31, 1967	286.43	373.59	87.16	174.32
Total				11,462.23

He was notified of the overpayment by the Army Finance Center in a letter dated February 21, 1967, in which his attention first was directed to the provisions of section 1, act of July 15, 1954, ch. 509, 68 Stat. 482, now 5 U.S.C. 5514, providing for recoupment of such overpayment by checkage in his retired pay. It was stated in the letter of February 21, 1967, that the amount of \$30 per month constituted the minimum acceptable recoupment amount. He was then further advised in the same letter that "In view of the existent circumstances, you may wish to seek private relief legislation through your Congressman." The record before us indicates that collection action was deferred by the Department of the Army at least until May 1, 1967.

As the matter now stands, Mr. Kunczek received \$11,462.23 more than the amount to which he was entitled under the applicable statutory provisions governing the computation of his retired pay during the period July 26, 1954, to January 31, 1967, inclusive. The fact that the overpayment resulted from an administrative error, which appears to be the case, and that such amounts were received by Mr. Kunczek in good faith and without knowledge of such error, which also appears to be the case, furnishes no legal basis to allow him to retain such money, and "cannot stand against the injustice of keeping what never rightfully belonged to him at all." *United States v. Bentley*, 107 F. 2d 382 (1939).

We have pointed out in connection with prior relief bills similar to H.R. 8479 that overpayments of pay, including retired pay, do occur from time to time in individual instances and that Congress has recognized the right of the Government and the duty of the accounting officers of the Government to recoup such overpayments directly from active duty or retired pay. See 5 U.S.C. 5514, Public Law 89-554, September 6, 1966 (formerly 5 U.S.C. 46d). We believe the cited statutory provisions were intended to have uniform application to all

active and retired members of the uniformed services. Moreover, a private relief bill of this nature tends to encourage all others who are overpaid to seek similar private relief from liability to refund the overpayment without regard to applicable provisions of law.

While the question of whether Mr. Kunczek should be relieved of his indebtedness involves a matter of policy for the Congress to decide, it should be noted that many members of the Armed Forces who have been overpaid retired pay because of an administrative error have been required to refund such overpayments. We are not aware at this time of any particular circumstances which would warrant passage of a private relief bill in favor of Mr. Kunczek. Accordingly, we do not favor enactment of H.R. 8479.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

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